88-171

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PETER W. HERZOG and JOAN L. HERZOG,
Appellants,

vs.

SAM J. COLDING, as Collier County Property Appraiser,
and the DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,
Appellees.

On Appeal from the Second District Court of Appeal,
Lakeland Florida

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. WHETHER ARTICLE VII, SECTION 6 OF THE FLORIDA CONSTITUTION AND SECTION 196.031 OF THE FLORIDA STATUTES, WHICH GRANT A TAX EXEMPTION TO RESIDENT OWNERS OF REAL PROPERTY BUT DENY SAME TO NON-RESIDENT OWNERS OF REAL PROPERTY IN THE STATE OF FLORIDA, VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES?

II. WHETHER ARTICLE VII, SECTION 6 OF THE FLORIDA CONSTITUTION AND SECTION 196.031 OF THE FLORIDA STATUTES, WHICH GRANT A TAX EXEMPTION TO RESIDENT OWNERS OF REAL PROPERTY BUT DENY SAME TO NON-RESIDENT OWNERS OF REAL PROPERTY IN THE STATE OF FLORIDA, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

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Appellants,

vs.

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OF THE STATE OF FLORIDA,
Appellees.

On Appeal from the Second District Court of Appeal,
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JURISDICTIONAL STATEMENT

Peter W. Herzog and Joan L. Herzog respectfully pray that this Court review the Order of the Florida District Court of Appeal, Second District, denying Appellants' Motion for Rehearing En Banc, or in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance entered on April 27, 1988 and the order of the Second District Court of Appeal affirming per curiam the Summary Final Judgment of the Circuit Court of Collier County dated March 9, 1988. This jurisdictional statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is presented by the Order of the Summary Final Judgment of the Circuit Court which holds that Article VII, section 6 of the Florida Constitution and section 196.031 of the Florida Statutes, as applied in this case, are not unconstitutional as

violative of the Privileges and Immunities Clause, Article IV, section 2, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. The Appellants contend that the above sections of the State Constitution and Statute are unconstitutional as applied in this case.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, Second District is unreported, but is reprinted in the Appendix hereto. (App. A-4).

The Summary Final Judgment of the Circuit Court of the Twentieth Judicial Circuit in Collier County, Florida is unreported, but is reprinted in the Appendix hereto. (App. A-6).

JURISDICTION

The Florida District Court of Appeal, Second District, entered its order affirming per curiam the Summary Final Judgment of the Circuit Court for Collier County on March 9, 1988. Appellants filed a Motion for Rehearing En Banc, or in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance. This Motion was denied on April 27, 1988. Appellants filed a notice of appeal to the Supreme Court of Florida on May 20, 1988, but said appeal was dismissed for lack of proper jurisdiction on May 27, 1988.

On July 13, 1988, a notice of appeal to the Supreme Court of the United States was timely filed in the Florida District Court of Appeal, Second District, the court rendering the judgment from which this appeal is taken, and in the Circuit Court of the Twentieth Judicial Circuit in Collier County, Florida, the court that is in possession of the record.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. IV, § 2:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Const. art. VII, § 6:

> (a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.
>
> (b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit. No exemption shall exceed the value of the real estate assessable to the owner or, in case of ownership through stock or membership in a corporation, the value of the

proportion which his interest in the corporation bears to the assessed value of the property.

(c) By general law and subject to conditions specified therein, the exemption shall be increased to a total of twenty-five thousand dollars of the assessed value of the real estate for each school district levy. By general law and subject to conditions specified therein, the exemption for all other levies may be increased up to an amount not exceeding ten thousand dollars of the assessed value of the real estate if the owner has attained age sixty-five or is totally and permanently disabled and if the owner is not entitled to the exemption provided in subsection (d).

(d) By general law and subject to conditions specified therein, the exemption shall be increased to a total of the following amounts of assessed value of real estate for each levy other than those of school districts: fifteen thousand dollars with respect to 1980 assessments; twenty thousand dollars with respect to 1981 assessments; twenty-five thousand dollars with respect to assessments for 1982 and each year thereafter. However, such increase shall not apply with respect to any assessment roll until such roll is first determined to be in compliance with the provisions of section 4 by a state agency designated by general law. This subsection shall stand repealed on the effective date of any amendment to section 4 which provides for the assessment of homestead property at a specified percentage of its just value.

(e) By general law and subject to conditions specified therein, the Legislature may provide to renters, who are permanent residents, ad valorem tax relief on all ad valorem tax levies. Such ad valorem tax relief shall be in the form and amount established by general law.

Fla. Stat. § 196.031:

(1) Every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person, is entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of $5,000 on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution. Such title may be held by the entireties, jointly, or in common with others, and the exemption may be apportioned among such of the owners as shall reside thereon, as their respective interest shall appear; but no such exemption of more than $5,000 shall be allowed to any one person or on any one dwelling house, except that an exemption up to the assessed valuation of $5,000 may be allowed on each apartment occupied by a tenant-stockholder or member of a cooperative apartment corporation and on each condominium parcel occupied by its owner; nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person.

* * *

(3) (a) * * *

(d) For every person who is entitled to the exemption provided in subsection (1) and who is a permanent resident of this state, the exemption is increased to a total of $25,000 of assessed valuation for taxes levied by governing bodies of school districts.

(e) For every person who is entitled to the exemption provided in subsection (1) and who is a resident of this state, the exemption is increased to a total of $25,000 of assessed valuation for levies of taxing

authorities other than school districts. However, the increase provided in this paragraph shall not apply with respect to the assessment roll of a county unless and until the roll of that county has been approved by the executive director pursuant to s. 193.1142.

* * *

STATEMENT OF THE CASE

Appellants Peter W. Herzog and Joan L. Herzog own real property in Naples, Florida located at 3160 Fort Charles Drive in Collier County. Since acquiring said property in 1979, Appellants have frequently occupied their Florida home as a temporary residence, particularly when necessary to enable Peter W. Herzog to pursue the practice of law in the State of Florida, where he is licensed. Appellants, however, have maintained their permanent residence in the State of Missouri, where Mr. Herzog is also a member of the State Bar and where both Appellants are registered to vote and pay income taxes.

Sam J. Colding, as Collier County Property Appraiser (hereinafter "Colding"), and the Department of Revenue for the State of Florida (hereinafter "Department of Revenue") have assessed ad valorem taxes on Appellants' real property, and on the real property of other non-permanent residents of the State of Florida on a basis that differs from that utilized for permanent residents. Specifically, the State of Florida grants only to permanent residents of Florida a $25,000.00 exemption on the assessed value of their real property. This exemption is found in Article VII, section 6 of the Constitution of the State of Florida and is implemented by Florida Statute section 196.031.

Appellants did not file an application for the Florida tax exemption since they were clearly ineligible under the permanent residency requirements. On November 22, 1985, Appellants commenced this action by filing a Complaint for Declaratory

Judgment against Sam Colding and the Department of Revenue of the State of Floria in the Circuit Court of the Twentieth Judicial Circuit in Collier County, Florida. (R. 6-8)

HOW THE FEDERAL QUESTION WAS RAISED

Appellants' Complaint for Declaratory Judgment alleged in part that:

> Assessment of the non-resident Plaintiffs' property at 3160 Fort Charles Drive at a value determined without the applicability of the $25,000.00 Homestead Exemption discriminates against Plaintiffs and is illegal and void for the reason that said denial of said Homestead Exemption violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America and Article IV Section 2 of the Constitution of the United States of America . . . .

(R. 6-8). The federal question presented was not changed in the two ensuing amended complaints. (R. 14-16; R. 31-34). Both the Appellants and Appellee Department of Revenue filed Motions for Summary Judgment. (R. 41-45; 40). On March 20, 1987 the Circuit Court entered an order of Final Summary Judgment denying Appellants' motion and granting the motion filed by Appellee Department of Revenue. In doing so, the court found, in part, that:

> None of the federal cases or other legal authorities relied upon by the Plaintiffs hold that it is constitutionally impermissible for a state to impose a condition precedent that real property has to be used as a "permanent residence" in order to be entitled to Homestead Exemption relief from ad valorem taxation.

(App. A-7).

Appellants reiterated their constitutional claims when appealing to the Florida District Court of Appeal for the Second

District. Brief of Appellants. After oral argument, the District Court of Appeal per curiam affirmed the Judgment of the lower court.

THE QUESTIONS ARE SUBSTANTIAL

I.

Even though both the Florida constitutional and statutory provisions in issue phrase the grant of the tax exemption in the terminology of "residence" rather than "citizenship," the resulting discrimination still violates the Privileges and Immunities Clause of Article IV, section 2 of the United States Constitution. As this Court has often noted, citizenship and residency are essentially interchangeable. *See, e.g., Supreme Court of Virginia v. Friedman,* 56 U.S.L.W. 4669, 4670 (U.S. June 20, 1988), *aff'g,* 822 F.2d 423 (4th Cir. 1987); *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274, 279 n.6, 105 S.Ct. 1272, 1276 n.6, 84 L.Ed.2d 205 (1985); *United Bldg. & Const. Trades Council v. Mayor & Council of Camden,* 465 U.S. 208, 216, 104 S.Ct. 1020, 1026, 79 L.Ed.2d 249 (1984). Thus, the residency requirement of Florida's tax exemption must be examined under this Court's previously enunciated two-step inquiry. In *Supreme Court of Virginia v. Friedman,* this Court stated that:

> First, the activity in question must be " 'sufficiently basic to the livelihood of the Nation' ... as to fall within the purview of the Privileges and Immunities Clause ...." ... Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial State interest.

Supreme Court of Virginia v. Friedman, 56 U.S.L.W. at 4670 (citations omitted).

The Privileges and Immunities Clause requires states to treat residents and non-residents equally when basic rights or essen-

tial activities are concerned. *Baldwin v. Montana Fish & Game Comm'n,* 435 U.S. 371, 387, 98 S.Ct. 1852, 1862, 56 L.Ed.2d 354 (1978). In *Paul v. Virginia,* 8 Wall. 168, 19 L.Ed. 357 (1869), Mr. Justice Field expounded on the essential purpose of this Clause in stating that:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

Id. at 180. (*quoted in Baldwin v. Montana Fish & Game Comm'n,* 435 U.S. at 380-81, 98 S.Ct. at 1858-59).

Although this Court has never conclusively enumerated all of the rights and activities protected by the Privilege and Immunities Clause, the leading case of *Corfield v. Coryell,* 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230) has provided guidance in this area for many decades. In *Corfield,* Mr. Justice Washington listed various privileges and immunities which were clearly embraced by the general description of privileges deemed to be fundamental and specifically included:

> The right of a citizen of one state to pass through or to reside in any other state for the purposes of trade, agriculture, professional pursuits, or otherwise; . . . to take, hold, and dispose of property, either real or per-

> sonal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . .

Id. at 552 (*quoted in Blake v. McClung,* 172 U.S. 239, 249, 19 S.Ct. 165, 169, 43 L.Ed. 432 (1898)).

Ths Court recently noted in *Piper* that the necessity of protecting these listed privileges to ensure the fusion of the several states into a Nation has not diminished. *Supreme Court of New Hampshire v. Piper,* 470 U.S. at 281 n.10, 105 S.Ct. at 1277 n.10. Unquestionably, the right to own property and the right to representation in taxation are two of the most fundamental rights on which this Nation was founded. As the Court has observed, non-residents have no opportunity to redress their grievances at the election polls, and so would be left with only uncertain remedies if not for the constitutional protection afforded by the Privileges and Immunities Clause. *United Bldg. & Const. Trades Council v. Mayor & Council of Camden,* 465 U.S. at 217-18, 104 S.Ct. at 1027; *Austin v. New Hampshire,* 420 U.S. 656, 662-63, 95 S.Ct. 1191, 1195-96, 43 L.Ed.2d 530 (1975); *Toomer v. Witsell,* 334 U.S. 385, 395, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460 (1948).

After determining that a state is discriminating between residents and non-residents in regard to fundamental rights, the Court then must examine whether there is a substantial reason for the discrimination and whether the discrimination bears a close relation to the reason. *Supreme Court of Virginia v. Friedman,* 56 U.S.L.W. at 4670; *United Bldg. & Const. Trades Council v. Mayor & Council of Camden,* 465 U.S. at 222, 104 S.Ct. at 1029. In order to constitute a "substantial reason" for legitimate discrimination, this Court has found that the non-resident must constitute a peculiar source of the evil at which the state law is aimed. *United Bldg. & Const. Trades Council v. Mayor & Council of Camden,* 465 U.S. at 222, 104 S.Ct. at 1029; *Hicklin v. Orbeck,* 437 U.S. 518, 525, 98 S.Ct. 2482, 2487, 57 L.Ed.2d 397 (1978); *Toomer v. Witsell,* 334 U.S. at 398, 68 S.Ct. at 1163.

The Appellees in this case had the burden to establish that the State of Florida had a substantial reason for the discrimination practiced on non-residents by the residency requirement found in the grant of the tax exemption. The Appellees' failure to meet this burden is abundantly clear from the Appellees' failure even to agree in the lower courts on the legislature's rationale in including a permanent residency requirement in the tax exemption grant. In his Brief to the Second District Court of Appeal, Colding suggests that the residency requirement is aimed at the encouragement of non-residents to relocate. Appellee's Answer Brief at 3-4. Contrarily, the Department of Revenue alleges in its Appellate Brief that the purpose of the tax exemption is to relieve Florida citizens in part from their tax burdens so as to ensure their maintenance of a "basic homestead." Answer Brief of Appellee, Department of Revenue, State of Florida at 27-28.

The Department of Revenue emphasized that Article VII, section 6(a) of the Florida Constitution and subsection (1) of section 196.031 of the Florida Statutes refer to a "permanent residence." The Department argued that this reflected the intention of exempting a homestead rather than discriminating against non-residents. *Id.* However, subsections (3) (d) and (e) of section 196.031 specifically state that the $25,000.00 exemption inures to "a permanent resident of this state" or "a resident of this state," respectively.

Further, the Department contended that the exemption can be claimed on only one dwelling and thus, even permanent residents owning two or more dwellings within the State cannot obtain tax relief on a second, vacation home. *Id.* at 11-13. The "vacation home" argument is fallacious, however. Florida Statute section 196.015 mandates certain factors that the property appraiser must take into consideration when determining whether the dwelling is the "permanent residence" of the applicant. Those factors are:

(1) Formal declarations of the applicant.
(2) Informal statements of the applicant.

(3) The place of employment of the applicant.
(4) The previous permanent residency by the applicant in a state other than Florida or in another country and the date non-Florida residency was terminated.
(5) The place where the applicant is registered to vote.
(6) The place of issuance of a driver's license to the applicant.
(7) The place of issuance of a license tag on any motor vehicle owned by the applicant.
(8) The address as listed on federal income tax returns filed by the applicant.
(9) The previous filing of Florida intangible tax returns by the applicant.

Fla. Stat. § 196.015 (Supp. 1988). These factors do not require the appraiser to consider the length of time during which the dwelling is occupied; only questions of citizenship are posed. Consequently, Florida citizens may claim whatever home they may care to as their "permanent residence" simply by complying with the factors enumerated above. This may be their "vacation home" on the beach, while they reside more often in an apartment in the interior. One thing is clear from these requirements; Florida residents may have a tax break at the place of their choice and Appellants may not at any site in Florida because they are citizens of Missouri.

Notwithstanding the fact that neither reason advanced by the Appellees constitute a "substantial reason" for discriminating against non-residents, these purposes also fail to satisfy the applicable legal standard. Assuming that insufficient immigration into the State of Florida and Florida citizens' inability to maintain a homestead due to their tax burdens are actually "evils" sought to be remedied by the tax exemption, the Appellees still have failed to establish how non-residents' ownership of property caused these evils. Neither can the Appellees establish a correlation between the revenue derived from the differential in taxation of residents and non-residents and the amelioration of

the evil. *Toomer v. Witsell,* 334 U.S. at 398-99, 68 S.Ct. at 1163-64. No evidence has been offered to support such a contention.

When examining tax classifications based on residency, this Court has sought to ascertain whether a tax burden placed solely on non-residents is counterbalanced by a corresponding benefit to the non-residents or by a corresponding burden on residents. *Austin v. New Hampshire,* 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975); *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920); *Shaffer v. Carter,* 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445 (1920); *Travelers' Insurance Co. v. Connecticut,* 185 U.S. 364, 22 S.Ct. 673, 46 L.Ed. 949 (1902). As this Court recognized long ago:

> Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. . . . The object should be to place the burden so that it will bear as nearly as possible equally upon all.

Travelers' Insurance Co. v. Connecticut, 185 U.S. at 371-72, 22 S.Ct. at 676 (quoting *Tappan v. Merchants' National Bank,* 19 Wall. 490, 504, 22 L.Ed. 189, 195 (1874)).

In *Shaffer* and *Travelers',* the Court upheld the tax schemes, determining that the non-residents were only required to make their ratable contribution in shouldering the State tax burden. *Shaffer v. Carter,* 252 U.S. at 56, 40 S.Ct. at 227; *Travelers' Insurance Co. v. Connecticut,* 185 U.S. at 371, 22 S.Ct. at 676. However, in *Austin* and *Travis,* this Court struck down the taxing systems when the tax was imposed exclusively on non-residents and was not offset by any benefit or equivalent burden on residents. *Austin v. New Hampshire,* 420 U.S. at 665, 95 S.Ct. at 1197; *Travis v. Yale & Towne Mfg. Co.,* 252 U.S. at 81, 40 S.Ct. at 232.

In this regard, the Department of Revenue argued at length in the lower courts the similarity between the case of *Rubin v.*

Glaser, 416 A.2d 382 (N.J.), *appeal dismissed*, 449 U.S. 997, 101 S.Ct. 389, 66 L.Ed.2d 239 (1980) and the present case. At issue in *Rubin* was the constitutionality of a homestead tax rebate only granted to residents of New Jersey. The Supreme Court of New Jersey upheld the validity of the statute. However, in *Rubin* the Homestead Rebate Act's enactment and operation were contingent upon the passage of the New Jersey Gross Income Tax Act and some of the revenues derived from the gross income tax were applied to the rebates. *Id.* at 387. Thus, although non-residents of New Jersey were denied the benefits of the property tax rebate, they had not contributed to the funds out of which the rebates were to be derived. Therefore, the differential treatment of the residents and non-residents in *Rubin* was directly related to the burden born particularly by residents.

The instant case differs from *Rubin* and the Supreme Court cases discussed above, however, in that Florida does not grant to taxpaying non-residents, as Appellants, any corresponding tax exemption or burden residents with any additional taxes which are related to the challenged tax exemption. Rather, the tax exemption only results in an inequitable tax burden born by non-Florida-residents and thus, the constitutional and statutory provisions granting said exemption are violative of the Privileges and Immunities Clause.

II.

The Equal Protection Clause prohibits the states from denying to any person within their jurisdiction the equal protection of the laws. *Western & Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. 648, 656-57, 101 S.Ct. 2070, 2077, 68 L.Ed.2d 514 (1981). However, the states are allowed to make reasonable classifications for tax schemes. *Williams v. Vermont*, 472 U.S. 14, 22, 105 S.Ct. 2465, 2471, 86 L.Ed.2d 11 (1985); *Western & Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. at 657, 101 S.Ct.

at 2077. The state need only establish classifications that the legislature could have reasonably concluded would promote a legitimate state purpose. *Williams v. Vermont,* 472 U.S. at 22-23, 101 S.Ct. at 2471.

In 1985, two Supreme Court cases revitalized the Equal Protection Clause as a barrier to discrimination by the states. These cases are analogous to the case at bar and so, will be examined in light of the reasons proffered by Colding and the Department of Revenue for the residency requirement of Florida's tax exemption as discussed in the previous section.

In *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), an Equal Protection challenge was raised against an Alabama Statute that imposed a lower gross premiums tax rate on domestic insurance companies than on out-of-state companies doing business within Alabama. The State urged two reasons for the discriminatory tax, one of which was that the heavier tax burden on foreign companies would encourage formation of companies within Alabama. *Id.* at 876, 105 S.Ct. at 1680. The Court stated that "Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there." *Id.* at 878, 105 S.Ct. at 1681. Further, the Court emphasized that: "[T]his Court always has held that the Equal Protection Clause forbids a State to discriminate in favor of its own residents solely by burdening 'the residents of other state members of our federation.' " *Id.* at 878, 105 S.Ct. at 1682 (quoting *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 533, 79 S.Ct. 437, 444, 3 L.Ed.2d 480 (1959). Consequently, this Court found that the State's purpose was not legitimate. *Id.* at 880, 105 S.Ct. at 1682.

Similarly, Colding argued in the lower courts that the purpose of denying the tax exemption to non-residents of Florida was to encourage Florida property owners to establish Florida as their

"permanent residence." However, the promotion of immigration by harming non-resident property owners is no more legitimate when applied to natural persons than this same purpose was when applied to insurance companies in *Metropolitan Life*. Moreover, in the instant case at least, it is not even rational to presume that a heavy tax burden on non-residents would entice these persons to make Florida their permanent residence rather than merely sacrificing their property holdings in that state.

This Court also struck down a discriminatory tax scheme in *Williams v. Vermont*. In that case, the validity of a Vermont use tax exemption was in issue that discriminated on the basis of residence at the time of the purchase of an automobile. The legitimate purpose offered by the State was the improvement and maintenance of the state and interstate highway systems. *Williams v. Vermont*, 472 U.S. at 18, 105 S.Ct. at 2469. The Court found that the taxing statute was violative of the Equal Protection Clause because "[t]he purposes of the statute would be identically served, and with an identical burden, by taxing [both those who purchased their cars while residing in Vermont and those who made the purchase prior to changing their residence]. The distinction between them bears no relation to the statutory purpose." *Id.* at 24, 105 S.Ct. at 2472.

The Department of Revenue of the State of Florida also has offered a rationale for the residency requirement of the tax exemption that would be equally well-served by allowing the exemption to both Florida residents and out-of-state residents. If the State's purpose in granting the exemption was to relieve Florida residents of some of their tax burdens to enable them to maintain a homestead, this purpose is not furthered by denying non-residents an exemption on their Florida property.

Moreover, Florida's alleged purpose of protecting residents' "homesteads" is merely a subterfuge for discriminatorily taxing non-residents of Florida. The Department argued in its Answer Brief that:

> When the homestead exemption provisions of Article X, s. 4 and Article VII, s. 6, Fla. Const., are construed in para materia to each other, the clear intent of these two provisons [sic] of the Florida Constitution to afford the basic "homestead" necessary for maintaining shelter for the family unit some economic protection from the full impact of property debt and tax liability is apparent.

Answer Brief of Appellee, Department of Revenue, State of Florida at 28. However, a recent opinion handed down by the Florida Supreme Court on two consolidated cases completely discredits the Department's argument. In *Public Health Trust v. Lopez*, Nos. 70,968 & 71,618 (Fla. June 9, 1988), the court construed Article X, section 4, which serves to exempt a decedent's homestead property from forced sale for the benefit of the decedent's creditors. The court found that the homestead protection was available to "any natural person." *Id.* slip op. at 9. Unlike Article VII, section 6 that grants the tax exemption, Article X, section 4 contains no permanent residency requirement. As a result, the homestead protection from creditors granted in Article X would be completely available to the Appellants, though they are denied the tax exemption granted in Article VII. Such incongruity is irreconcilable and irrational when the Department's argument is based on construing these articles in para materia to each other.

Consequently, the State's purpose could be identically served by granting the tax exemption to Appellants and other non-permanent residents of Florida and, therefore, the classification system contained in the constitutional and statutory provisions granting the tax exemption cannot withstand analysis under the Equal Protection Clause. Indeed, Florida's scheme is exposed for what it is; a *tax preference* favoring citizens of Florida for which no rational explanation can be given.

CONCLUSION

For all of the foregoing reasons this appeal presents substantial federal questions and this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

(Trial Court Case No. 85-2774-CA-01)

Appeal Cause No. 87-1056

Peter W. Herzog and Joan L. Herzog,
Appellants,

vs.

Sam J. Colding, as Collier County Property Appraiser,
and Department of Revenue of the State of Florida,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Peter W. Herzog and Joan L. Herzog, Appellants herein, appeal to the Supreme Court of the United States, the final order of this Court rendered on March 9, 1988 affirming per curiam the judgment of the trial court and the denial of Appellants' Motion for Rehearing En Banc or in the Alternative, for Certification to the Supreme Court of Florida as a Question of Great Public Importance entered on April 27, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of this Notice of Appeal was mailed, first-class postage pre-paid, on this 13th day of July, 1988 to all parties required to be served, to wit:

James H. Siesky, Esq.
791 10th Street, South
Suite B
Naples, Florida 33940

J. Terrell Williams
Assistant Attorney General
Department of Legal Affairs
Tax Section
Capital Building
Tallahassee, Florida 32399

/s/ PETER W. HERZOG, JR.
Counsel of Record

APPENDIX B

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

April 27, 1988

Case No. 87-1056

Peter W. Herzog and Joan L. Herzog,
Appellants,

v.

Sam J. Colding, as Collier County Property Appraiser,
and Department of Revenue of the State of Florida,
Appellees.

Appellants having filed a motion for rehearing en banc or, in the alternative for certification to the Supreme Court as a question of great public importance in the above-styled case, upon consideration, it is

ORDERED that said motion is hereby denied.

A TRUE COPY
ATTEST:

/s/ William A. Haddod, Clerk
Second District Court of Appeal

cc: Peter W. Herzog
J. Terrell Williams
Leo J. Salvatori, Esq.
James Siesky, Esq.

APPENDIX C

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

Case No. 87-1056

Peter W. Herzog and Joan L. Herzog,
Appellants,

v.

Sam J. Colding, as Collier County Property Appraiser,
and Department of Revenue of the State of Florida,
Appellees.

Opinion filed March 9, 1988.

Appeal from the Circuit Court for Collier County;
William C. McIver, Judge.

Peter W. Herzog of Caruthers, Herzog,
Crebs & McGhee,
St. Louis, Missouri and
Leo J. Salvatori of Quarles & Brady,
Naples, for Appellants.

James H. Siesky of Siesky,
Lehman & Espey, Naples for Appellee
Sam J. Colding and Robert A. Butterworth,
Attorney General and J. Terrell Williams,
Assistant Attorney General,
Tallahassee, for Appellee,
Department of Revenue.

State of Florida
County of Polk

This copy is a true copy of original opinion on file in this office.

Witness, my hand and official seal this sixteenth day of May, 1988.

/s/ William A. Haddad, Clerk
Second District Court of Appeal

PER CURIAM.

Affirmed.

DANAHY, C.J., and THREADGILL and PARKER, JJ., Concur.

APPENDIX D

IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT, IN AND FOR
COLLIER COUNTY, FLORIDA

Case No. 85-2774-CA-01

Peter W. Herzog & Joan Herzog,
Plaintiffs,

vs.

Sam J. Colding, et al.,
Defendants.

SUMMARY FINAL JUDGMENT

THIS MATTER came on for hearing on the Motions for Summary Judgment filed by the Plaintiffs and by the Defendant, Department of Revenue, State of Florida. The Plaintiffs allege in their Second Amended Complaint that the portion of the Homestead Exemption provisions of Art. VII, s. 6(c) and (d), Fla. Const., and the statutory provisions of s. 196.031(3)(d) and (e), Fla. Stat., imposing a "permanent residence" requirement in order for property to be entitled to the partial homestead exemption under Florida law is violative of the Due Process and Privileges and Immunities Clauses of the U.S. Constitution and the "similar provisions" of the Florida Constitution. All the parties hereto have agreed that there are no material disputed facts related to this issue. After reviewing the record and the various memorandums of law filed herein on behalf of the respective parties, and being otherwise duly advised, the Court finds and concludes that:

1. The subject constitutional subsections attacked by the Plaintiffs (subsections (c) and (d) of s. 6, Art. VII, Fla. Stat.)) do not contain any reference to "permanent residents" or "permanent residence." This language viewed as constitutionally

objectionable by the Plaintiffs is found in the preceding subsection (a) of Art. VII, s. 6 and in the challenged statutory provisions of s. 196.031(3)(d) and (e).

2. It is undisputed that the Plaintiffs are permanent residents of the State of Missouri, and that the subject real property owned by the Plaintiffs in Collier County, Florida, is a temporary residence occupied by the Plaintiffs from time to time during the year.

3. Plaintiffs failed to cite to the Court any statutes or case law of Florida holding that similar property owned by a permanent resident of Florida and occupied only periodically during the year as a "seasonal" or "vacation" dwelling would be entitled to the homestead tax exemption under Florida law.

4. None of the federal cases or other legal authorities relied upon by the Plaintiffs hold that it is constitutionally impermissible for a state to impose a condition precedent that real property has to be used as a "permanent residence" in order to be entitled to Homestead Exemption relief from ad valorem taxation.

IT IS THEREFORE, ORDERED AND ADJUDGED THAT:

(A) The Motion for Summary Judgment filed the Plaintiffs, Peter W. Herzog and Joan L. Herzog is denied.

(B) The Motion for Summary Judgment filed by the Defendant, Department of Revenue, State of Florida, is hereby granted.

(C) There being no other issues remaining, summary final judgment is hereby rendered against the Plaintiffs and in favor of the Defendants in this case.

DONE AND ORDERED, in Chambers at the Collier County Courthouse, Naples, Florida, this 19th day of March, 1987.

/s/ William C. McIver
Circuit Judge

Copies furnished to:
James H. Siesky, Esq.
Leo J. Salvatori, Esq.
J. Terrell Williams, Esq.
Peter W. Herzog, Esq.